IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Joel P. Hoekstra, Presiding Judge

MARCIA VAN TIL
Plaintiff-Appellant,

v

Docket no. 128283

ENVIRONMENTAL RESOURCES MANAGEMENT, INC
Defendant-Appellee.
_____/

SUPPLEMENTAL BRIEF ON APPEAL - AMICUS CURIAE COMPENSATION LAW SECTION

1 / May 2006

Supplemental brief per SC order

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STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE COURT

The Court has jurisdiction to review the opinion that was entered by the Court of Appeals in *Van Til v Environmental Resources Mgt, Inc*, unpublished opinion of the Court of Appeals, decided on February 10, 2005 (Docket no. 250539) by the authority of Michigan Court Rule 7.301(A)(2).

STATEMENT OF QUESTION PRESENTED[1]

I

WILL OVERRULING THE DECISION IN THE CASE OF *SEWELL v CLEARING MACHINE CO*, 419 MICH 56; 347 NW2d 447 (1984) PRODUCE PRACTICAL REAL-WORLD DISLOCATIONS?

Plaintiff-appellant Van Til answers "Yes."

Defendant-appellee Environmental answers "Yes."

Amicus curiae Workers' Comp Law Section and Director of Workers' Comp Agency answer "No."

Amicus curiae Michigan Defense Trial Counsel and Michigan Trial Lawyers Ass'n answer "Yes."

Court of Appeals did not answer.

Trial court did not answer.

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[1] The Court propounded this question in *Van Til v Environmental Resources Mgt, Inc*, 474 Mich - ; - NW2d - (2006), slip 2.

STATEMENT OF FACTS

Byron Van Til was an employee of Environmental Resources Management, Incorporated, who asked that Marcia Van Til help with waxing some floors and suggested doubling his paycheck to avoid the inconvenience of two separate payments for the job. Steve Koster, his supervisor, agreed.

Marcia was burned by the wax remover applied by Byron and sued Environmental for not warning of the danger. Environmental answered that it was immune from the lawsuit because Marcia was an employee whose only recourse was workers' disability compensation because of the first and second sentences of MCL 418.131(1).[2] Marcia replied that she was only a volunteer.

Initially, the trial court allowed the lawsuit upon deciding that Marcia was not an employee because the evidence — the testimony of Marcia and Byron Van Til and Steve Koster — established that there had been no contract of hire with Environmental as required by the first sentence of MCL 418.161(1)(l).[3] However, on reconsideration, the trial court dismissed the suit with its decision that Environmental was responsible for

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[2] "The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort."

[3] "As used in this act, 'employee' means:

* * *

Every person in the service of another, under any contract of hire, express or implied, including aliens; a person regularly employed on a full-time basis by his or her spouse having specified hours of employment at a specified rate of pay; working members of partnerships receiving wages from the partnership irrespective of profits; a person insured for whom and to the extent premiums are paid based on wages, earnings or profits; and minors, who shall be considered the same as and have the same power to contract as adult employees."

compensation because of the first sentence of MCL 418.171(3),[4] which applied because Steve had allowed Byron to hire Marcia to help with the job. The trial court did not account for the requirement of the second sentence of MCL 418.171(2).[5] *Van Til v Environmental Resources Mgt, Inc*, unpublished opinion of the Court of Appeals, decided on February 10, 2005 (Docket no. 250539) 1-2, 4.

The Court of Appeals affirmed with *its* decision that Marcia was an employee of Environmental. *Van Til, supra*, 4.

The Court granted leave to appeal and directed briefing the question "whether the trial court had jurisdiction to determine whether plaintiff was an employee, or whether that question must first be resolved in the workers' compensation adjudicatory system. See *Reed v Yackell*, 473 Mich 520, 542 (2005) [CORRIGAN, J., dissenting]." The Workers' Compensation Law Section of the State Bar of Michigan was invited to file a brief amicus curiae. *Van Til v Environmental Resources Mgt, Inc*, 474 Mich 913 (2005). After briefing and argument, the Court asked for briefs on the subject of "(1) the effect of overruling *Sewell, supra*, on reliance interests and whether overruling would work an undue hardship because of that reliance, and (2) whether overruling *Sewell, supra*, would produce not just

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[4] "If any employer subject to the provisions of this act, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, who is not subject to this act or who has not complied with the provisions of section 611, and who does not become subject to this act or comply with the provisions of section 611 prior to the date of the injury or death for which claim is made for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any person employed in the execution of the work any compensation under this act which he or she would have been liable to pay if that person had been immediately employed by the principal."

[5] "The employee shall not be entitled to recover at common law against the contractor for any damages arising from such injury if he or she takes compensation from such principal." (emphasis supplied)

readjustments, but practical real-world dislocations. *Robinson, supra* at 466." *Van Til v Environmental Resources Mgt, Inc*, 474 Mich - ; - NW2d - (2006).

ARGUMENT

I

OVERRULING THE DECISION IN THE CASE OF *SEWELL v CLEARING MACHINE CO*, 419 MICH 56; 347 NW2d 447 (1984) WILL NOT PRODUCE PRACTICAL REAL-WORLD DISLOCATIONS.

The Court can overrule the decision in the case of *Sewell v Clearing Machine Co*, 419 Mich 56; 347 NW2d 447 (1984) with confidence that there will be no practical, real-world dislocations by recognizing the replacement, by comparing the situations that do involve dislocation, and by establishing a safeguard.

A. *SEWELL* DISPLACED A COHERENT REGIMEN THAT WAS FAITHFUL TO THE TEXT OF THE FIRST SENTENCE OF MCL 418.841(1).

There was a coherent regimen before the decision by the Court in the case of *Sewell, supra*. This regimen was that a circuit court would suspend action in a lawsuit and refer the parties to the Workers' Compensation Agency for a determination that the defendant was or was not the "employer" of the plaintiff. *Bednarski v Gen Motors Corp*, 88 Mich App 482, 487; 276 NW2d 624 (1979). *Dixon v Sype*, 92 Mich App 144, 149-150; 284 NW2d 514 (1979). *Buschbacher v Great Lakes Steel Corp*, 114 Mich App 833, 838-839; 319 NW2d 691 (1982). *Johnson v Arby's Inc*, 116 Mich App 425, 431-432; 323 NW2d 427 (1982). *Houghtaling v Chapman*, 119 Mich App 828, 831-832; 327 NW2d 375 (1982). The case of *Houghtaling, supra*, 831-832, is representative of the protocol,

> "the trial court in the instant case went too far when it concluded that, as a matter of law, workers' compensation is the sole and exclusive remedy for William Houghtaling's injuries. That question must first be decided by the bureau. We reverse the circuit court's order in that respect and remand the matter to the circuit court. William Houghtaling shall, within 30 days of the release date of this opinion, file with the bureau an application for a hearing on the question in controversy. If such application is timely filed, the circuit court

> shall hold the instant action in abeyance pending the decision of the bureau. If the bureau determines that William Houghtaling's injuries were suffered in the course of his employment, or if William Houghtaling fails to apply for a bureau determination within 30 days or to seek review of this decision in the Supreme Court in timely fashion, the accelerated judgment of dismissal in the circuit court shall stand affirmed but without prejudice for the reasons stated in this opinion. If the bureau finds the injuries not to be work-related, the circuit court action may proceed. [citations omitted]"

This regimen was entirely faithful to the common and approved meaning of **all** in the first sentence of MCL 418.841(1), which describes the subject matter jurisdiction of the Workers' Compensation Agency and the Board of Magistrates by stating that, "Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and **all questions arising under this act shall be determined by the bureau or a worker's compensation magistrates, as applicable.**" (emphasis supplied) Certainly, a question that a person is or is not an "employer" of another is a **question arising under this act** as **employer** has a specific definition in the Workers' Disability Compensation Act of 1969, MCL 418.101, et seq., and is a condition for the liability for benefits as well as immunity from a lawsuit. MCL 418.131(2). MCL 418.151. MCL 418.155(1)(a) - (d). MCL 418.171(1). MCL 418.301(1). And the Workers' Compensation Agency and Board of Magistrates have actually decided disputes about whether a person is or is not an "employer" of another by the terms of the WDCA. See, e.g., *Betts v Ann Arbor Pub Schs*, 403 Mich 507; 271 NW2d 498 (1978). *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561; 592 NW2d 360 (1999).

This regimen was also true to the very function of the Workers' Compensation Agency and Board of Magistrates, which was recognized by the Court in the case of *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 702, n 5; 614 NW2d 607 (2000), when stating that,

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> "[5] This distinction between the administrative and judicial standards of review flows from the long-recognized principle

> that administrative agencies possess expertise in particular areas of specialization. Because the judiciary has neither the expertise nor the resources to engage in a fact-intensive review of the entire administrative record, that type of detailed review is generally delegated to the administrative body. In the particular context of worker's compensation cases, a highly technical area of law, the judiciary lacks the expertise necessary to reach well-grounded factual conclusions. Worker's compensation cases typically involve lengthy records replete with specialized medical testimony. **These cases require application of extremely technical and interrelated statutory provisions that determine an employee's eligibility for disability benefits. The judiciary is not more qualified to reach well-grounded factual conclusions in this arena than the administrative specialists.** Therefore, the Legislature has decided that factual determinations are properly made at the administrative level, as opposed to the judicial level.
>
> Further, the courts simply cannot review the record in every worker's compensation case in the detail required to make conclusions about the sufficiency of the magistrate's decision. Worker's compensation cases are typically fact intensive, involving lengthy deposition testimony and medical documentation. If the courts were to attempt a review of each and every worker's compensation case with an eye toward making detailed factual conclusions, dockets would become impossibly burdened with worker's compensation cases, further delaying the resolution of injured workers' claims for benefits. These considerations—lack of appropriate expertise and resources—demonstrate the practical benefits flowing from the Legislature's creation of a two-tier reviewing process, which delegates to the WCAC the role of ultimate factfinder, while limiting the judiciary to the role of guardian of procedural fairness."
>
> (emphasis supplied)

This regimen worked well. Certainly, the Court of Appeals always used it. There was no dissension to the procedure in any opinion of the Court of Appeals. The Court never reproved it. Indeed, the Court endorsed this procedure even after *Sewell, supra*. Justice BRICKLEY said in the case of *Adams v Nat'l Bank of Detroit*, 444 Mich 329, 370, 371; 508 NW2d 464 (1993) (BRICKLEY, J., concurring) that,

> "The first issue to be addressed is whether the trial court had jurisdiction to determine that the exclusive remedy provision did not bar this suit on the basis that decedent's injuries did not arise out of and in the course of his employment.

> This Court has addressed this issue in *Szydlowski, supra*. While undergoing treatment for work-related injuries, the plaintiff in that case died as a result of drugs that were improperly administered by his employer. The Court held that whether the plaintiff's death arose out of employment could only be determined by the workers' compensation bureau. *Id.*, p 359. Although this Court has narrowed the scope of this rule in subsequent cases, when the issue is whether injuries arose 'out of and in the course of employment,' the rule remains unchanged: the bureau **must** make the initial determination.
>
> * * *
>
> it is unclear whether the injuries suffered by the decedent in this case arose out of his employment. We observe that a nexus of some sort exists between the decedent's injury and his employment. It is not for this Court to determine whether this nexus is sufficient to bring the injuries suffered under the coverage of the WDCA. Under these circumstances, that determination **must** be made by the bureau." (emphasis supplied)

And the Court applied this procedure in *Reed v Yackell*, 473 Mich 520, 540-541; 703 NW2d 58 (2005),

> "we reverse in part the judgment of the Court of Appeals and remand this case to the circuit court for entry of a directed verdict in defendants' favor. Jurisdiction over this case is thereafter transferred to the Bureau of Worker's Disability Compensation. Should Reed desire to pursue a claim for benefits under the WDCA, he shall present an appropriate claim for compensation to the bureau no later than thirty das after the date this opinion is issued. For the purposes of MCL 418.381(1), the bureau shall treat Reed's claim for benefits as having been filed on December 10, 1998, the date he filed his complaint in the circuit court."

Overruling *Sewell, supra*, will only restore this regimen that was an accepted and functioning success. Overruling *Sewell, supra*, does not require experimenting with some new rule and awaiting the results.

The decision by the Court in the case of *Sewell, supra*, should not be maintained in view of the fact that overruling means only the restoration of the coherent regimen as Justice CORRIGAN said in the case of *Robinson v City of Detroit*, 462 Mich 439, 473; 613 NW2d 307 (2000) (CORRIGAN, J., concurring),

"rapid change in the law threatens judicial legitimacy, as it threatens the stability of any institution. But the act of correcting past rulings that usurp power properly belonging to the legislative branch does not threaten legitimacy. Rather, it restores legitimacy. Simply put, our duty to act within our constitutional grant of authority is paramount. If a prior decision of this Court reflects an abuse of judicial power at the expense of legislative authority, a failure to recognize and correct that excess, even if done in the name of stare decisis, would perpetuate an unacceptable abuse of judicial power."

B. THE CASES OF *KNOX v LEE*, *IN RE CONSTITUTIONALITY OF 1972 PA 294*, AND *MASSEY v SECRETARY OF STATE* INVOLVED A DIFFERENT SITUATION THAN THAT IN *SEWELL*.

In the case of *Robinson, supra*, 466, n 26, the Court provided examples of the kind of case that could be preserved from overruling for the concern of having a practical, real-world dislocation or chaos,

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"[26] Cases that come to mind with regard to reliance that, even if wrongly decided, we might nevertheless decline to overrule could well be our recent ruling regarding term limits *Massey v Secretary of State*, 457 Mich 410; 579 NW2d 862 (1998), or this Court's initial advisory opinion with regard to automobile no-fault insurance. *In re Constitutionality of 1972 PA 294*, 389 Mich 441; 208 NW2d 469 (1973). What it is that singularizes these cases, even as with the United States Supreme Court's legal tender cases after the Civil War, see *Knox v Lee*, 79 US (12 Wall) 457; 20 L Ed 287 (1870), is that to overrule them, even if they were wrongfully decided, would produce chaos."

The Court was right. These cases cannot be revisited let alone overruled without disturbing the very foundations of government. Overruling the decision in the case of *Sewell, supra,* is not at all similar.

In all three of the cases that the Court referenced in the case of *Robinson, supra*, 466, n 26, a statute was sustained as valid law by rejecting the claims of a conflict with a provision of the United States Constitution or the Constitution of Michigan. Overruling would invalidate a law. Overruling the case of *Sewell, supra*, would not invalidate a law. In the case of *Sewell, supra*, the Court did not sustain a statute as a valid

law. The Court only described an application of a statute, the first sentence of section 841(1), to establish an exception in the procedure for deciding **all questions arising under this act** for the question whether a person was an "employer." Certainly, overruling the decision in the case of *Sewell, supra*, will not expunge a statute from the law.

In all three of the cases that the Court referenced in the case of *Robinson, supra*, 466, n 26, a statute was sustained as valid law by sustaining the power of the Congress or the Michigan Legislature to enact laws. Overruling would not just erase existing laws. Overruling would preclude rewriting the statutes to avoid a conflict with the United States Constitution or the Constitution of Michigan. Overruling the decision in the case of *Sewell, supra*, would not preclude the Legislature from amending any statute for the issue there was not about the power of the Legislature to enact or amend the first sentence of section 841(1).

And in all of the cases that the Court referenced in the case of *Robinson, supra*, 466, n 26, the very operation of government was involved. Overruling would implicate the foundation of government and ordered society. The statutes that were involved in the case of *Knox v Lee*, 79 US (12 Wall) 457, 458-459; 20 L Ed 287 (1870) authorized paper currency or "tender" as money in addition to metal or "specie" as the United States Supreme Court said,

> "The ordinary money in use in the United States at the time of the sale and purchase being notes of the United States, commonly known as 'greenbacks'-notes whose issue was authorized by acts of Congress, and dated February 25th, 1862, July 11th, 1862, and March 3d, 1863, 1 and which the said acts declared should be a legal tender in the payment of all debts-the plaintiffs offered to prove what was the difference in value between gold and silver and this United States currency known as greenbacks, for the purpose of showing that gold and silver had a greater value than greenbacks, and for the purpose of allowing the jury to estimate the difference between the two, to which evidence the defendant, at the time it was offered, objected, on the ground that the United States currency was made a legal tender by law, and that there was no difference in value in law between the two. The court sustained the objection, and excluded all evidence as to the difference in

> value between specie and legal tender notes of the United States, and no evidence was allowed to go to the jury on this point."

It is a signal function of any government to establish an economy and then monetize it. And people — including citizens of other nations and other nations themselves — rely on that form as money. Even questioning the validity of the decision in the case of *Knox, supra,* would produce a cataclysm by implying that paper money printed by the United States was merely paper and was not really money at all. Indeed, overruling *Knox, supra,* would effect a repudiation of the debt of the United States and all that that would imply.

The statutes that were involved in the case of *In re Constitutionality of 1972 PA 294*, 389 Mich 441, 459-460; 208 NW2d 469 (1973) involved describing the rights and remedies of a citizen when injured by another in a car crash. The statutes allowed a lawsuit for damages only when a person died, was seriously impaired, or permanently disfigured as the Court observed in *In re Constitutionality of 1972 PA 294, supra,* 460,

> "The provisions of the new Chapter 31 which are at issue are set forth in § 3135(1), which reads in part:
>
> > 'A person remains subject to tort liability for non-economic loss caused by his ownership, maintenance or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function or permanent serious disfigurement.
>
> The new provisions become effective on October 1, 1973."

It is beyond cavil that describing the rights between citizens and then regulating the redress for infringement is a defining characteristic of any government. Overruling *In re Constitutionality of 1972 PA 294, supra,* would not effect auto "no-fault." It would effect all of the legislation which describes the rights between citizens and regulates the redress such as the WDCA and so-called "tort reform."

And the statutes that were involved in the case of *Massey v Secretary of State*, 457 Mich 410; 579 NW2d 862 (1998) described who was eligible to serve in the

government by limiting the length of service in office. The Court said in the case of *Massey, supra*, 411-412,

> "At the general election on November 3, 1992, the voters approved Proposal B, adding four new sections to the Constitution of 1963. On March 9, 1998, plaintiffs filed suit in the Wayne Circuit Court. Plaintiffs allege that they are voters in two legislative districts who would like to vote for the reelection of their current representatives but that those representatives are ineligible to run for reelection under Const 1963, art 4, § 54. Plaintiffs allege that art 4, § 54 is void because the submission of Proposal B at the 1992 election failed to comply in two ways with the requirements for submission of petition-initiated proposals set by Const 1963, art 12, § 2."

An election and who may be a candidate is the foundation of republican government. Overruling *Massey, supra* would not change future elections. Overruling *Massey, supra*, would invalidate many — if not all — elections after November 3, 1972, and *that* would vitiate all of the actions of all those people who had been elected. Statutes would fail. Rules and regulations collapse. Appointments of subordinates vacated. That is dislocation.

The statute implicated by the decision of the Court in the case of *Sewell, supra* — the first sentence of section 841(1) — pales by comparison to those statutes involved in the cases of *Knox, supra, In re Constitutionality of 1972 PA 294, supra*, and *Massey, supra*. The first sentence of section 841(1) does not monetize an economy. The first sentence of section 841(1) does not define the rights and redress for an infringement by one citizen on another. The first sentence of section 841(1) does not involve who is and who is not eligible to stand for election. Indeed, the first sentence of section 841(1) does not involve the foundation of government. All that the first sentence of section 841(1) does is allocate where a decision is made when there is a **question arising under this act**. While it is important to allocate where a decision can be made, it is qualitatively different from monetizing an economy, redefining rights and remedies, and describing eligibility for elective office, which are the cardinal functions of government.

Overruling the decision in the case of *Sewell, supra*, cannot cause a dislocation when its ruling is recalled. The Court held in the case of *Sewell, supra*, 62, that there were actually two places that were available to decide one particular **question arising under this act**,

> "the *Szydlowski* principle is that the bureau has exclusive jurisdiction to decide whether injuries suffered by an employee were in the course of employment. The courts, however, retain the power to decide the more fundamental issue whether the plaintiff is an employee (or fellow employee) of the defendant."

Overruling *Sewell, supra*, would mean that there would be just one place where a decision might be made about any **question arising under this act**. A dislocation could be said to occur only where there is *no* place to decide upon the overruling of the case of *Sewell, supra*.

C. ANY MISCHIEF CAN BE CONTAINED.

Overruling the decision in the case of *Sewell, supra*, could mean that the judgments that were previously entered and ostensibly final are not reliable at all because of a lack of jurisdiction by the circuit court. An order entered by a court not having jurisdiction is void and can be vacated at any time. *Ward v Hunter Machine Co*, 263 Mich 445, 449; 248 NW 864 (1933). *In re Estate of Fraser*, 288 Mich 392, 394; 285 NW 1 (1939). Exactly how many of these cases there may be is not known or readily ascertainable. Circuit courts and those litigants should be able to rely on these judgments when *Sewell, supra*, gave colorable subject matter jurisdiction.

This problem of reliance by this discrete group can be contained while overruling the decision in the case of *Sewell, supra*, by specific exemption, which the Court has the full authority to do in its exercise of judgment. See *Brief on Appeal - Amicus curiae Compensation Law Section*, Argument I, 4-6. (The Court may observe that the existence of this prophylactic underscores the legitimacy of overruling *Sewell, supra*, itself and the difference with those cases in which real dislocation could occur. That is, there is no

prophylactic for the consequences of overruling *Knox, supra, In re Constitutionality of 1972 PA 294, supra,* or *Massey, supra.*)

RELIEF

Wherefore, amicus curiae Workers' Compensation Law Section of the State Bar of Michigan prays that the Supreme Court vacate the opinion of the Court of Appeals in *Van Til v Environmental Resources Mgt, Inc*, unpublished opinion of the Court of Appeals, decided on February 10, 2005 (Docket no. 250539) and remand the case to the Workers' Compensation Agency for remission to the Board of Magistrates to convene a hearing and decide in a written order and opinion whether Marcia Van Til was an *employee* within the rubric of MCL 418.161(1)(l) and (n) which may be appealed to the Workers' Compensation Appellate Commission, the Court of Appeals and Supreme Court by the terms of MCL 418.859a(1) and MCL 418.861a(14) before deciding whether to affirm or vacate the judgment of the Circuit Court for the Twentieth Judicial Circuit of the State of Michigan.

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